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NO. 92-469

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES LOAGUE,
Petitioner,

VERSUS

SUPER SAGLESS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Super Sagless Corporation,[1] submits this Brief opposing the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

In his Statement of the Case, Petitioner misstates the District Court's rationale for refusing the requested jury instruction. The District Court did not hold that *McDonnell Douglas Corp. v. Green* applies only in non-jury cases. (Petition at 3.) Instead, in refusing the requested instruction, the District Court stated:

> THE COURT: You see why the jury doesn't decide this *prima facie* business, Counsel. It's really just a vehicle used in the case like this where discrimination is rarely admitted or an open type thing that you can prove by direct evidence. The case lay (sic) says that indeed it is rather difficult to prove. And so by giving these four factors, which if proven, it simply shifts the burden of production over. I don't want to confuse this jury with the burden of production shifting to one party and what have you. So, I don't know. I'm not going to give all this.

(T. 339.) Subsequently during the charge conference, the District Judge noted:

> THE COURT: ...and the truth is, the *prima facie* case, has been made and they have articulated the legitimate, non-

[1] Pursuant to Rule 29.1, Respondent states that Mohasco Corporation is its parent. Citicorp is the parent of MHS Holdings Corporation, which is the parent of Mohasco Corporation.

discriminatory reason.

MR. JAQUA: (Respondent's Counsel) Your Honor, that's my objection to it, is that the case would not even [be] before them if we didn't have the *prima facie* case.

THE COURT: That's right.

(T. 341.)

Thus, the trial judge did apply the *McDonnell Douglas v. Green* analysis in this jury case in deciding that a *prima facie* case had been established, that the Defendant had articulated a legitimate, non-discriminatory reason for the discharge, and that, therefore, there was a question of fact (motivation) that was submissible to the jury. Recognizing that "the jury doesn't decide this *prima facie* business," the judge decided not "to confuse this jury with the burden of production shifting to one party and what have you." (T. 339.)

The jury was charged that: they were to "carefully and impartially consider all the evidence in the case" (T. 359), "you must consider all the evidence" (T. 361); the Plaintiff has the burden of proving by a preponderance of the evidence "that age was a determinative factor in Defendant's decision to terminate Plaintiff's employment" (T. 363); "if age was a determinative factor in the decision to terminate the Plaintiff, then the Defendant is liable to the Plaintiff even though other factors might also have contributed to the decision" (T. 363-64); "[i]ntent to discriminate means actual motive" (T. 364); and "Mr. Loague must convince you by a preponderance of the evidence that the reasons given by Super Sagless are only a cover-up for intentional age discrimination against him." (T. 365.)

On appeal, the Fifth Circuit decided that "[t]he Court's instructions accurately informed the jury that Loague had the burden of proving discrimination." (Petitioner's Appendix at 11.) The Court of Appeals also agreed with the District Judge's rationale in rejecting the proposed *McDonnell Douglas* instruction:

> Once the Defendant has produced evidence of a non-discriminatory motive for discharge and the Plaintiff has (as in the instant case) come forward with evidence that the asserted motive is actually a pretext for discrimination, "the trier of fact should proceed directly to the ultimate question of whether the Defendant intentionally discriminated against Plaintiff." [Citing *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992) (quoting *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983)]. ... In fact, we also considered it confusing and unnecessary for the Court to instruct the jury of shifting burdens of presumption.

(Petitioner's Appendix at 10.)

SUMMARY OF THE ARGUMENT

In an ADEA case, where a *prima facie* case has been established under the *McDonnell Douglas Corp. v. Green* formulation and the employer has articulated legitimate, non-discriminatory reasons for its actions, the jury is presented the ultimate fact issue of the employer's real motive in the challenged action. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). There is no need for the jury to be instructed as to the *prima facie* elements at this stage, and several courts of appeals have recognized that such instructions could be

confusing. In the instant case, the Court of Appeals found that the jury was adequately instructed as to the ultimate issue to be decided, namely, whether age was a determinative factor in the employer's decision. *Aikens* strongly supports, if not compels, that conclusion. There is no conflict in the circuits calling for the Court's reconciling guidance, especially in light of *Aikens*. Petitioner has mischaracterized and distorted the appellate decisions cited in the Petition.

ARGUMENT

1. The Court's Precedents Subsequent To *McDonnell Douglas Corp. v. Green* Strongly Support, If Not Compel, The Fifth Circuit's Decision Affirming Refusal Of The Requested *Prima Facie* Instruction.

In this case, the Fifth Circuit cited and relied on *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). However, Petitioner does not even mention those cases, much less address their holdings and rationales.[2]

In *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714, 715 (1983), the Court held that when the defendant fails to persuade the District Court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of its reasons for the challenged actions, "the fact finder must then decide whether the [challenged action] was discriminatory." At this stage, "the *McDonnell-Burdine*

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[2] A similar evasion of existing law occurred below, where the Court of Appeals noted the "troubling aspect of Loague's conduct in this appeal is his utter failure to raise or address binding circuit precedent until forced by [Respondent] to respond in his reply brief." (Petitioner's Appendix at 12.) Double costs of appeal were assessed as a sanction. *(Id.)*

presumption 'drops from the case,' [450 U.S. at 255 n.10], and 'the factural inquiry proceeds to a new level of specificity.' *Id.* at 255." *Aikens,* 460 U.S. at 715. The Court explained that where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, it is no longer relevant whether the plaintiff really did so. The trier of fact "should have proceeded to the specific question directly, just as district courts decide disputed questions of fact in other civil litigation." *Id.* at 715, 716.

In *Aikens,* the Court expressly recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult, but concluded that this does not mean that trial courts should treat discrimination differently from other ultimate questions of fact. "Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof,' . . . in deciding this ultimate question." *Id.* at 716 (internal citation omitted.)

Under *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), the significance of the establishment of a *prima facie* case is that the employer is then required to articulate (but not prove) a legitimate, nondiscriminatory reason or explanation for its action. Once the defendant has met its burden of production, the presumption of discrimination under *McDonnell Douglas Corp. v. Green* simply "drops from the case." *Burdine,* 450 U.S. at 255, n.10. The plaintiff's burden of showing that the defendant's reason is pretextual "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Id.* at 256.

It has long been recognized that in a disparate treat-

ment case "[p]roof of discriminatory motive is critical." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977). As the judge charged the jury in the instant case, intent to discriminate means "actual motive," and is a question of fact. *Pullman-Standard v. Swint,* 456 U.S. 273, 285-89 (1982). "[I]t is not a legal presumption to be drawn from the factual showing of something less than actual motive." *Id.* at 290.

Consistent with *Burdine* and *Aikens,* the District Judge in the instant case correctly noted that the *McDonnell Douglas* formulation is simply a "vehicle" for the trial court's use in discrimination cases. This tool is also utilized in jury cases, but by the judge, not the jury. The jury decides the question of fact as to actual discrimination; as in other civil litigation, the judge decides whether such a triable issue of fact exists.

The jury in the instant case was presented the ultimate issue and was instructed to consider all of the evidence. Petitioner had the opportunity to attempt to persuade the jury that his replacement by a younger individual demonstrated that he was the victim of intentional age discrimination and that the Respondent's explanation was only a pretext or cover-up for discrimination. Indeed, Petitioner challenges only the denial of his requested instruction, but forwards no objections to the admission of evidence, the conduct of the trial, or to the correctness of the remainder of the trial court's jury instructions.[3]

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[3] Petitioner also seems to contend that the judge was required to comment to the jury concerning Petitioner's showing that he was replaced by a much younger individual. However, Petitioner requested no special limited instruction in this regard. Although trial judges have certain *discretion* to comment on evidence, they are rarely, if ever, *required* to do so.

2. There Is No Conflict In The Circuits Calling For The Court's Reconciling Guidance.

Petitioner's argument that the Fifth Circuit's decision is in conflict with those of the First Circuit and other circuits grossly mischaracterizes the cited decisions and ignores the significant fact that the First Circuit's decision in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) was decided prior to both *Burdine* and *Aikens*. See Petition at 5-6.[4]

Even though *Loeb v. Textron* was decided prior to *Burdine* and *Aikens*, the First Circuit noted there the significant danger that reading a *McDonnell Douglas* formulation to a jury might "add little to the jurors' understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination." 600 F.2d at 1006. Subsequently, *Aikens* decided that the trier of fact should proceed directly to the ultimate question of motivation once the defendant has responded to a *prima facie* case. After *Aikens*, there is no enduring rationale for the *Loeb* court's statement that the jury should be asked to make findings as to the *prima facie* elements. Moreover, in the instant case, there was no triable issue that Petitioner had been replaced by a much younger individual — that fact was admitted by Respondent. Hence, there was no need (and no request for) a special

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[4]Petitioner also argues that the Fifth Circuit decision is inconsistent with *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Even a cursory review of Patterson reveals that the decision in that case has no relevance. At most, the Court noted that *McDonnell Douglas* presented a "sensible, orderly way to evaluate the evidence" in the course of deciding that a case tried under 42 U.S.C. §1981 should be treated similar to one under Title VII. The instant case does not present the issue of whether *McDonnell Douglas* is to be applied in an ADEA action — the courts below assumed that *McDonnell Douglas* was a proper framework for the judge to follow in deciding whether to submit the case to the jury.

instruction or interrogatory on this element.

Most disturbing is that Petitioner mischaracterizes decisions from the Second, Sixth, Seventh, and Eighth Circuits as following the "rule" of *Loeb v. Textron*, allegedly contrary to the Fifth and Fourth Circuits. A review of the cited decisions, however, reveals that none of them stand for the cited proposition, and several are either *directly contrary* to the proposition or do not address the issue at all.

Stanojev v. Ebasco Services, Inc., 643 F.2d 914 (2d Cir. 1981), is a pre-*Aikens* case which does not even address the issue here. Moreover, Petitioner does not mention the Second Circuit's subsequent decision in *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85-86 (2d Cir. 1983), a post-*Aikens* decision in which the Second Circuit specifically rejected a similar argument that a jury should have been instructed on the elements of a *prima facie* case. As here, the judge had properly instructed the jurors that they must find that age is a "determinative factor" and that age need not be the only contributing factor. *Id.* at 80, 86.

Petitioner similarly misstates the holdings of the Sixth Circuit. Although *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983) was decided a few months before *Aikens*, the *Blackwell* court specifically held that "it was not error for the court to refuse to instruct the jury on the *prima facie* elements of a discrimination case as set forth in *McDonnell Douglas.*" *Id.* at 1179, 1180. The court also noted that in weighing the adequacy of jury instructions, they must be taken as a whole. *Id.* at 1181. As in the instant case, the trial judge's instructions adequately informed the jury of the issue that they were to decide. *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987) cited and relied on *Aikens* (825 F.2d at 1012), in concluding that a failure to follow *McDonnell Douglas* and

Burdine in jury instructions was not in error. *Id.* at 1012. Petitioner does not cite more recent Sixth Circuit decisions reaffirming that circuit's view that *McDonnell Douglas/Burdine* jury instructions are *not* required and, moreover, would add little to jurors' understanding. *See Booker v. Brown*, 879 F.2d 1304, 1311 (6th Cir. 1989); *Lewis v. Sears*, 845 F.2d 624 (1988).

Golomb v. Prudential Insurance Company of America, 688 F.2d 547 (7th Cir. 1982), cited by Petitioner, was also decided prior to *Aikens*. While a jury instruction in that case included elements of a *prima facie* case, there was no challenge on appeal in that respect. The plaintiff challenged the judge's failure to explain the meaning of "pretext." The judge had referred to it as "cover-up." The judge had also instructed the jury that they were to determine whether age was a "determinative factor." The Seventh Circuit held that it was not reversible error to fail to explain in greater detail the meaning of "pretext," and that the jury instructions as a whole were adequate.

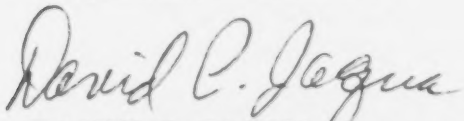
Petitioner also cites *Perry v. Kunz*, 878 F.2d 1056 (8th Cir. 1989), although Perry did not deal with jury instructions at all. The court simply overturned a grant of summary judgment, noting that the plaintiff was not limited to proving her case through the *McDonnell Douglas* formulation. In *Dehues v. Western Electric Co.*, 710 F.2d 1344 (8th Cir. 1983), the *plaintiff* objected to the use of the four elements of a *prima facie* case in the jury instructions. The court merely concluded that there was no reversible error, because the elements of a *prima facie* case were actually *disputed* and one of the parties insisted that proof of each element was essential to the case. 710 F.2d at 1347. In the instant case, there was no such dispute as to the *prima facie* elements.

In short, Petitioner has disingenuously posited an irreconcilable conflict between the circuits based on mischaracterizations of cited cases, where in fact there is scarcely a suggestion of tension between the courts of appeals on this issue. Certainly, in light of *Aikens*, there is not a sharp conflict calling for the Court's reconciling guidance.

CONCLUSION

The Petition for A Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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VERSUS

NO. 92-469

Super Sagless

I hereby certify that 40 copies of the Opposition brief in the above entitled and numbered cause have been filed with the Clerk, U.S. Supreme Court and copies have been served upon the following parties:

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BY: Barry F. Bacon Jr.

Thomas Taylor
NOTARY

October 14, 92
DATE

THOMAS J. TAYLOR
NOTARY PUBLIC, PARISH OF ORLEANS, LA.
MY COMMISSION IS ISSUED FOR LIFE